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TABLE OF AUTHORITIES

CASES

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

NO.

BOB BULLOCK, *et al.*,
Appellants

v.

DIANA REGESTER, *et al.*,
Appellees

PRESTON SMITH, *et al.*,
Appellants

v.

JOHNNY MARRIOTT, *et al.*,
Appellees

PRESTON SMITH, *et al.*,
Appellants

v.

VAN HENRY ARCHER, *et al.*,
Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

JURISDICTIONAL STATEMENT

This appeal is from decisions of the United States District Court for the Western District of Texas in three of four consolidated actions challenging the work of the Legislative Redistricting Board of Texas. These decisions hold that the districting of the State of Texas into districts for the election of its one hundred fifty member House of Representatives is constitutionally defective because (1) there are excessive population variances between the districts, and (2) multi-member districts in Dallas and Bexar (includes City of San Antonio) Counties tend to unconstitutionally dilute the votes of Negro citizens (Dallas County) and Mexi-

can-American citizens (Bexar County).[1] No appeal has been perfected from the fourth action, *Graves* v. *Barnes,* in which the lower court held the districting of Harris County (includes the City of Houston) into state senatorial districts not to be a racial gerrymander. The Archer appellees are appellents in *Archer, et al* v. *Preston Smith, et al,* No. 71-1676 filed here June 23, 1972. That appeal is from a lower court ruling that state senatorial districts in Bexar County are not politically gerrymandered against the Republicans of Bexar County. It is being handled by separate instruments.

The Republicans of Dallas and Bexar Counties have alleged that multi-member House districts in those counties unconstitutionally dilute the votes of Republicans. The lower court did not rule on this contention, believing that the relief imposed for ethnic reasons (single member districts for Dallas and Bexar Counties) would, in any event, give the Republicans all the relief to which they might be entitled.

The lower court ordered into immediate effect on January 28, 1972, single member districts for Dallas and Bexar Counties. The lower court gave the Texas

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[1]While the lower court discusses at some length the different treatment accorded Harris County in comparison with the other metropolitan counties of Texas, and strongly hints there might be some constitutional infirmity because of the difference, the court does not seem to so hold. Appellants are prepared to argue on plenary consideration of the case that difference alone does not require justification and that the lower court's reasoning is really indicative of an aversion to multi-member districts that cannot be confined to differences between metropolitan areas. Whatever can be said about the differences between multi-member districts in one metropolitan area and single member districts in another is applicable to the differences between multi-member districts and single member districts generally. Appellants would argue that absent something other than a mere difference, multi-member districts in one metropolitan area as opposed to single-member districts in another metropolitan area are *per se* constitutional.

Legislature until July 1, 1973, to try again to district the state as a whole. The legislature had previously tried in 1971 but its efforts were declared by the Texas Supreme Court to be in violation of the state constitution's prohibition against cutting county lines in the less populous counties. *Smith* v. *Craddick,* 471 S. W. 2d 375 (Tex.Sup. 1971) (178F)[1] Because of this, the Texas Constitution required the Legislative Redistricting Board of Texas to redistrict the state.[2]

It is the work of the Legislative Redistricting Board of Texas that is now *sub judice.*

OPINIONS BELOW

The opinions and orders of the court below are not yet reported. They are reproduced in the separately bound Appendix. They consist of: Per Curiam opinion (1A-62A); Order of the Court (63A-82A); Opinion by Justice, District Judge, concurring in part and dissenting in part (83A-96A); Opinion by Wood, District Judge, concurring in part and dissenting in part (97A-108A); Notation by Goldberg, Circuit Judge, concurring specially in the result of section four of the per

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[1]The separately bound appendix has consecutively numbered pages. The letter designations are to indicate separate entries. All page references are to the appendix.

[2]While the Board's action in apportioning the Texas House districts is severely criticized because only done pursuant to mandamus (21A) issued in *Mauzy* v. *Redistricting Board,* 471 S.W.2d 570 (Tex.Sup. 1971) (186F), the criticism seems wholly unfounded. The California Supreme Court, construing a state constitutional provision very similar to Article III, Section 28, Texas Constitution, had held that even invalid action by the legislature prevented the Board from acquiring jurisdiction of the apportionment. See please, *Yorty* v. *Anderson,* 60 Cal. 2d 312, 33 Cal. Rptr. 97, 384 P. 2d 417 (1963) and *Legislature* v. *Reinecke,* 6 Cal. 3d 595, 99 Cal. Rptr. 481, 492, P. 2d 385 (1972). Both the Texas and California constitutions create a Board to apportion the state if the legislature fails to apportion at the first regular session following the decennial census. See please, 190F-192F.

curiam opinion (having to do with multi-member districts in Bexar County) (109A); and Amendatory Order (110A-113A).

Application for stay of that portion of the lower court judgment immediately implementing single member districts in Dallas and Bexar Counties was presented to Mr. Circuit Justice Powell and by him denied, with opinion. —— U.S. ——, 92 S.Ct. 752 (February 7, 1972.) This opinion is reproduced in the Appendix, page 197H.

JURISDICTION

The actions below were brought to enjoin enforcement of a statute of the State of Texas enacted by the Legislative Redistricting Board of Texas pursuant to Article III, Section 28 of the Texas Constitution. Jurisdiction of the three judge district court was invoked under 28 U.S.C. §§ 1343 and 2281. The date of the judgment sought to be reviewed is January 28, 1972. Notice of Appeal was filed March 27, 1972 (114B) in the United States District Court for the Western District of Texas, Austin Division. On May 19, 1972, by order in No. A-1207, Mr. Justice Powell extended time for docketing this appeal to and including July 25, 1972. The jurisdiction of this Court to review the judgement of the district court is founded on 28 U.S.C. §§ 1253 and 2101(b). Jurisdiction is supported by *Swann* v. *Adams*, 385 U.S. 440 (1967), and *Reynolds* v. *Sims*, 377 U.S. 533 (1964).

QUESTIONS PRESENTED

I. Whether the legislative districting plan adopted by the Legislative Redistricting Board of Texas was a permissible one within the standards hitherto set by this Court, and hence whether the action of the court below, in overturning the Board's plan, was improper.

II. Whether the multi-member district used by the Board for Bexar County, Texas, unconstitutionally dilutes or cancels the votes of the Mexican-American citizens who constitute a plurality of the citizens of Bexar County.

III. Whether the multi-member district used by the Board for Dallas County, Texas, unconstitutionally dilutes or cancels the vote of ethnic minorities.

STATUTES INVOLVED

There are two statutes involved. One is the Apportionment Of The State Of Texas Into Representative Districts. This statute is not yet published. It is printed in the appendix (118C-132C.) The other is Article III, Section 26, Texas Constitution. This constitutional provision is printed in the appendix (174E) and has recently been interpreted by the Texas Supreme Court. *Smith* v. *Craddick, supra* (178F.)

STATEMENT

Texas is larger in area than France. It has two hundred and fifty-four counties. A number of them are larger than the states of Delaware and Rhode Island. One is larger than Connecticut and Rhode Island combined. These counties range in population from 164 (Loving County) and 464 (King County) to 1,741,912 (Harris County) and 1,327,321 (Dallas County.)*

Article III, Section 2, Texas Constitution, sets the size of the Texas Senate at 31 members and the size of the Texas House of Representatives at 150 members. Article III, Section 25, Texas Constitution (173E), mandates single member senatorial districts based on

*Statements of area are confirmed by the 1972 WORLD ALMANAC and 1970-71 TEXAS ALMANAC. Population figures are from the 1970 CENSUS OF POPULATION, *PC (V1)-45, Texas Final Population Counts*, pp. 3-4.

qualified electors, as nearly as may be, and contiguous territory, and contains no injunction that county lines must be preserved (although generally they are now and always have been.)

Texas Constitution, Article III, Section 26, provides that members of the Texas House of Representatives shall be apportioned among the several *counties*[1] according to the population in each, as nearly as may be, based on the most recent United States census,

> provided, that whenever a single county has sufficient population to be entitled to a Representative, such county shall be formed into a separate Representative District, and when two or more counties are required to make up the ratio of representation, such counties shall be contiguous to each other; and when any one county has more than sufficient population to be entitled to one or more Representatives, such Representative or Representatives shall be apportioned to such county, and for any surplus of population it may be joined in a Representative District with any other contiguous county or counties.

Counties are still a very important center of government in rural Texas, and Texas is still, in terms of area, largely a rural state.

The last regular session of the Texas Legislature (1971) attempted to apportion the state into House districts. On September 16, 1971, its result was declared unconstitutional. *Smith* v. *Craddick, supra* (178F.) A main reason for this ruling was unnecessary cutting of county lines in rural areas in violation of the Texas Constitution, Article III, Section 26.

While fully recognizing the supremacy of the federal law, the Texas Supreme Court said (185F), "The federal requirement of equal representation clearly

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[1]All emphasis is the writers' unless otherwise noted.

has not nullified Section 26 of Article III in its entirety." The Texas Supreme Court also said, speaking of the districting requirements of the state constitution (184F), "If these districting requirements were excused by the requirements of equal representation, the appellants [the state officials] had the burden of presenting that evidence."

The Legislative Redistricting Board of Texas [hereinafter referred to as the Board] attempted to satisfy both federal and state constitutions. The result is a reapportionment of the state that makes only one division of a small county in contravention of Article III, Section 26 of the state constitution, and otherwise fully complies with the state constitution, yet keeps all districts within a maximum variation ranging from a low of 4.1% under the optimum to a high of 5.8% over the optimum (153C-155C.) The optimum computed by dividing the population of the state (11,196,730) by the number of House districts (150) is 74,645. The least populous district has a population of 71,597. The most populous district has 78,943. The least percentage of the population of the state that can in theory elect a majority of the Texas House of Representatives is 49.89% (based on the total population of the 76 lowest population districts.) The average deviation, plus or minus, of all districts is 1,356 or 1.82%.*

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*The lower court has expressed some doubt about the way used by the state to compute the deviation in multi-member districts (fn. 5, 13A). For example, Dallas County with 1,327,321 people was given eighteen representatives. Eighteen times the state optimum totals 1,343,610. 1,343,610 minus 1,327,321 equals 16,289. 16,289 divided by the optimum (74,645) equals .21+, thus it is said that there may exist in Dallas County a 21+ % deviation. The state divided the total population of Dallas County by eighteen and arrived at an average figure that is 1.2% under the optimum. (Dallas County grew in population 39.5% from 1960 to 1970, 1970 CENSUS *op. cit. supra* 3). The state's computation method seems in

The record in this case is conclusive that the Board used the lowest population plan available to them that sought to comply with the state constitutional requirement of keeping county lines intact in rural areas. Only one departure was made from the state requirement. It was made in northeast Texas. Bowie County (includes Texarkana, Texas) is bordered on two sides by the states of Oklahoma and Arkansas. Bowie County has a 1970 population of 67,813,' not enough for its own representative (9.15% under the optimum.) The lowest population in any of the three Texas counties adjacent to Bowie County is 12,310 in Morris County. The total of these two counties is 80,123 (7.34% over the optimum.) Morris County borders Bowie County only diagonally, and a district composed of these two counties would have adversely affected the overall flexibility of arrangement of other counties in the area. Therefore, Red River County (population 14,298) was divided. It borders Bowie County on the west and Oklahoma on the north. Following trial, some of the Republican appellees presented a plan for the state cutting one county line in northeast Texas and alleged to have an overall deviation of 9% as opposed to the Board's plan of 9.9%. This plan was not available to the Board. Appellants do not know whether or not it has been computer checked for accuracy.

No evidence was tendered to show how the representation of any individual or group might have been ad-

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keeping with this Court's thinking in *Whitcomb* v. *Chavis*, 403 U.S. 124, 144 (1972), ". . . that Fortson, Burns and Kilgarlin proceeded on the assumption that the dilution of voting power suffered by a voter who is placed in a district 10 times the population of another is cured by allocating 10 legislators to the larger district instead of the one assigned to the smaller district." The state's method has been approved, *Kelly* v. *Bumpers*, (E.D. Ark., Civil No. LR-71-C-159, March 21, 1972).

'1970 CENSUS, *op. cit. supra* 3.

versely affected by the trivial population variances that exist between the districts created by the Board plan.

All the testimony at trial concerned the alleged effects of multi-member districting in Bexar and Dallas Counties and the allegations of racial and political gerrymander in the senatorial districting of Harris and Bexar Counties. The circumstances regarding multi-member districting in Dallas and Bexar Counties are discussed *infra* with the presentation of questions two and three.

The lower court has simply failed to "find the facts specially and state separately its conclusions of law thereon." FED. R. CIV. P. 52. It relies on broad conclusions. The members of the court below could agree on little except results, and not altogether on them. As Judge Wood put it (105A):

> I can think of nothing which illustrates better the agonizing chaos which exists in the area of restructuring the political districts of the sovereign States than this decision, wherein it is painfully obvious that the three Judges composing this very Court have almost no unanimity in finding a path from the impenetrable thicket in which the Federal Courts now find themselves.

THE QUESTIONS ARE SUBSTANTIAL

I

Population variations of the size present in this case between legislative districts, resultant from an evenhanded application of a provision of the Texas Constitution designed to preserve the integrity of small counties, do not indicate unfair representation nor deny the "equal protection of the laws."

Already this year, this Court has stated that the absolute mathematical equality rule of *Kirkpatrick* v.

Preisler, 394 U.S. 526 (1969), and *Wells* v. *Rockefeller,* 394 U.S. 542 (1969), does not squarely control legislative districting and that if you "are to consider the applicability of *Preisler* and *Wells* to state legislative districts, it would be preferable to have before us a final judgment with respect to the entire State." *Connor* v. *Williams,* —— U.S. ——, 92 S.Ct. 656, 658 (1972).

Kilgarlin v. *Hill,* 386 U.S. 120, 123 (1967), while striking down a total variance of 26.48%, three times the variance now before the Court, stated, "But we need not reach that constitutional question [the extent of variance justifiable to conform to the state constitution], for we are not convinced that the announced policy of the State of Texas necessitated the range of deviations between legislative districts which is evident here."

Both the above questions are squarely presented by this appeal. Appellants contend (1) that a rule of precise mathematical equality is not applicable to legislative districting and that the legislative plan here presented is within tolerable limits and (2) that the good faith effort to comply with the state constitutional mandate for county integrity here presented would be adequate justification for the size deviations here present from absolute equality even if a rule of precise mathematical equality were applicable to legislative districting.

The lower court has held (2-1) the state constitution to be *no* rational justification for any deviation from precise mathematical equality. This holding is without precedent and contrary to earlier case law where another three judge court said concerning the same provision of the Texas Constitution:

> The Court finds that Section 26 embodies the State policy to maintain the integrity of counties

and county lines, and that such is a rational policy, . . ." *Kilgarlin* v. *Martin,* 252 F.Supp. 404, 427-428 (1966), rev'd in part, *sub nom., Kilgarin* v. *Hill,* 386 U.S. 120 (1967).

The wishful optimism of the earlier cases, that the lower courts could work out some meaningful standards by which to judge districting plans, has not been justified. The only precise standard yet used, population equality, past a point, becomes hollow; nevertheless, the earlier cases could be handled by a pure population standard. After all, it does not take much reasoning to convincingly demonstrate that disparities of 19 to 1 and 8 to 1 between districts are unfair [*Baker* v. *Carr,* 369 U.S. 186, 245 (1962) (Douglas J., concurring)] nor that disparities of up to 102.2 to 1 are wrongful. See please, DIXON, DEMOCRATIC REPRESENTATION 266 (1968), Chart 8, *Statistical Measures of "Malapportionment" in the Fifteen State Legislatures Held Unconstitutional By The United States Supreme Court June 15 and June 22, 1964.* While of the earlier cases, the Colorado case, *Lucas* v. *Colorado General Assembly,* 377 U.S. 713 (1964) does not appear egregious, even it had a ratio of 1.7 to 1.

Then came *Kilgarlin* v. *Hill,* 386 U.S. 120 (1967) striking down a variance of from 11.64% under-represented to 14.84% over-represented. This case has received criticism. DIXON, *op. cit., supra,* 447-451. Indeed, in Professor Dixon's words, p. 449, "The Court has characterized the reapportionment issue as being a matter only of equalizing gross population clusters, rather than as being one of achieving fair and effective political representation." Even so, *Kilgarlin* shared one common attribute with earlier cases. The apportionment in *Kilgarlin* was not as equal as it might have been, and yet preserving of county integrity. In that context *Kilgarlin* and the earlier cases differ from the

present one. Here and now the Court is presented with a best effort. Given that fact, does the plan adopted for the legislative districts of Texas provide fair representation? There is no evidence to show that it does not.

This case does not concern the franchise to vote, *e.g.*, *Gomillion* v. *Lightfoot,* 364 U.S. 339 (1960), or the weighing of one person's vote for more than another's in a given political contest, *e.g.*, *Gray* v. *Sanders,* 372 U.S. 368 (1963). The question now presented concerns fair representation of persons, and of persons organized into various natures of groups. "One person, one vote," when referring to equality between the votes for a particular candidate in a particular race is unquestionably sound. To say that a vote by A in an election for X must precisely equal the vote of B in an election for Y is less clear. In *Whitcomb* v. *Chavis,* 403 U.S. 124, 145-146, this Court rejected as too remote the statistical probabilities of Professor Banzhaf concerning the effect of multi-member voting in a given situation. While appellants do not claim to be statisticians, the probability of a minority of the voters of Texas under the Board plan electing a House majority on any particular issue would seem even more remote. It would mean that all members from the 75 smallest constituencies would have to vote one way and the members from the 74 larger constituencies would have to vote another way. (This example allows for the speaker who normally would not vote.) Where the population variations between districts are politically random, because created by the jigsaw puzzle-like creation of districts from whole counties to achieve the smallest population variations thereby possible, the probability of such an alignment occurring seems absolutely to lack meaning. Even such an improbable alignment would still be meaningless in terms of minority rule unless the margin of election of each of the representatives in

each of the districts was decided by a margin of approximately one vote. To suppose that a vote in any given district is of the same importance politically as a vote in any other district is to sacrifice political fact to mathematical theory. The vote of a member of a political minority in a "safe" district is not equal in effect to the vote of an independent in a "swing" district.

Appellants would contend in this case that once low levels of population variance are achieved, as in this case, other considerations become of great importance. It is because of supposed insulation from politics and compromise—a supposition often demonstrably in error—that court redistricting and court insistance on mathematical precision is bad. Every man interested in politics has his own idea of how a districting plan should be formulated. It is doubtful that absolute population equality is at the top of most lists of considerations. What seems evident from the flood of cases following the 1970 census [fifty-one are known to this writer] is that politically motivated plaintiffs are seeking to use the courts not so much to insure equality of districts as to bring about changes in districts for their own political purposes. In many instances plaintiffs have succeeded completely because courts have simply thrown out the attacked plan and chosen a plan formulated by the attacking plaintiffs [as in imposing single-member districts in Dallas and Bexar Counties, discussed *infra.*] In other instances plaintiffs have achieved a degree of success by having the districting body compelled to redistrict, a procedure plaintiffs can then use to try once again to accomplish their own political purposes.

Appellants would contend that while equality of population and political considerations are not necessarily antagonistic in theory or final result, near absolute

equality of population is greatly antagonistic to political processes. Any plan drawn for submission to a districting authority will have political effect. Those members of the authority having familiarity with given areas will have greater knowledge of political impact in those given areas and adjustments will in all probability need to be made to insure fair representation of the people. Yet if there is no play in the joints of government such adjustments cannot be made. Even relatively minor adjustments between districts proposed cannot be made because of a ripple effect over the whole state. It requires minimal imagination to picture the fate of the poor legislator who proposes an amendment to make even a minor adjustment to afford better representation to people in his own area. If he is so bold, he will almost surely be voted down on the arguments that the plan can't be changed, the mathematics are right, and the whole plan simply can't be jeopardized; and that he can't be allowed to make adjustments because others would then want also to make adjustments. The process of compromise—the life blood of practical politics—is most applicable to political choices, but some small palpitations in numbers are necessarily reflected by its workings in legislative districting. Mathematics are important, but Godlike mathematics cut the heart out of democratic government. A standard of precise mathematical exactitude has a wholly undesirable and unavoidable tendency to unwanted (by the courts as well as the public) judicial autocracy, and stifles legislative process.

Appellants would contend that it is wholly unsound to say that there is no point short of absolute equality of population where considerations of substantial population equality achieve parity with the partisan gerrymander, community of interest, political subdivision lines, and the other things that should be considered in

an effort to achieve fair representation. If this Court approves the rule of mathematical precision applied by the lower court it will be abandoning the good it has done and will be repudiating the wisdom of *Reynolds* v. *Sims,* 377 U.S. 533, 578 (1964) in not setting precise constitutional tests, as opposed to viewing each case on its own merit.

Appellants would contend that a rule of precise mathematical equality, as applied by the lower court, amounts to a presumption of invalidity and furnishes the presumption as a substitute for evidence where neither side can by any objective proof establish the effect, or lack of effect, on legislative action, of a particular small population variance. Therefore a rule of precise mathematical equality in legislative districting not only, we would argue, misplaces the burden of proof in instances of trivial population variance, it furnishes by irrefutable presumption, its own proof that any districting plan judged by a rule of precise mathematical equality is invalid. An examination of the current cases establishes that a rule of precise mathematical equality would be bad, and that in those cases announcing such a rule and yet upholding small deviations, often no proof of justification is apparent but rather it is obvious the court considered the variations too trifling to merit judicial relief. In fact, the results of the lower courts are somewhat random. They run from a decision requiring reapportionment where the total spread of deviation, lowest to highest, was 1.4% [*Wiedman* v. *Kentucky,* E.D. Ky., Civil No. 1637, April 13, 1972—*a congressional case*] to one upholding a 19.41% deviation [*Summers* v. *Cenarrusa,* D. Idaho, Civil No. 1-71-53, January 5, 1972, pending in this Court, No. 71-1190, 40 L.W. 3493—a legislative case.] There are at least three cases other than *Summers* v. *Cenarrusa* approving population deviations between

legislative districts greater than 10% (*Wold* v. *Anderson,* D. Mont., Civil No. 939, November 22, 1971; *Stewart* v. *O'Callaghan,* D. Nev., Civil No. R-2549, May 18, 1972; *Stevenson* v. *West,* D. S.C., Civil No. 72-45, April 7, 1972) and one approving a 9.5% deviation. *Kelly* v. *Bumpers,* (E.D. Ark., Civil No. LR-71-C-159, March 21, 1972). Courts have adopted plans of 5.1% total variation (*Anderson* v. *Docking,* D. Kan., Civil No. W-3220, April 20, 1972) and 7.2% total variation (*Mahan* v. *Howell,* E.D. Va., 330 F.Supp. 1138, Stay denied, 404 U.S. 1201, Jurisdiction noted, —— U.S. ——, 92 S.Ct. 1490.) Courts have struck down plans with 7.83% total deviation (*Cummings* v. *Meskill,* D. Conn., Civil No. 14,736, March 30, 1972, Stay granted, *sub nom., Gaffney* v. *Cummings,* No. 71-1476, 40 L.W. 3587) and with 4.25% total deviation (*Millican* v. *Georgia,* N.D. Ga., Civil No. 16,401, April 19, 1972, Stay granted, *sub nom., Fortson* v. *Millican,*—— U.S. ——, 92 S.Ct. 1601, Motion to Vacate denied, —— U.S. ——, 92 S.Ct. 1763.)

Perhaps the worst result of adoption of a rule of too close mathematical precision would be that the proper districting authorities would not even try, *e.g., Prince* v. *Kramer* (W.D. Wash., Civil No. 9668, April 21, 1972.)

Nowhere has experience better shown small population variances to be meaningless than in the history of Missouri congressional apportionment. In 1969 this Court struck down a variation of 25,802 people between the highest and lowest congressional district and required the Missouri Legislature to reapportion on the 1960 figures. It did, and its new 1969 plan was approved by the lower court as complying with *Kirkpatrick.* When the 1970 census figures were in, it was found that districts approaching equality under the

1960 census varied as much as 228,314 persons, and that the difference between only two of Missouri's ten districts was less than that invalidated by *Kirkpatrick*. Appendix To Jurisdictional Statement at 3, *Danforth* v *Preisler*, (No. 71-1396, aff'd, 40 L.W. 3582, June 13, 1972.) Figures such as these absolutely explode the notion that small population variances are of any real meaning. In the present case the lower court has criticized deviation in Harris County. All the deviations in Harris County cited by the lower court are under the optimum count. Harris County grew 40.1% in population from 1960 to 1970. 1970 CENSUS, *op cit. supra* 4.

Another revealing example of the rough nature of raw census figures is provided by a comparison of two diagonally touching single member districts in Harris County, Texas, districts 90 and 93. The total population of district 90 (74,377) is .4% under the optimum for a Texas Legislative district (74,645) and 2.2% greater than the total population of district 93 (72,761) (which is 2.5% under the optimum). The number of persons of voting age in district 90 is 55,681; the number of persons of voting age in district 93 is 39,767. In percentages, district 90 has 2.2% more people than district 93 but has 40.2% more people of voting age. *Report No. 01140687, Office of Information Services of the Office of the Governor of Texas (extract of population data from the First Count Tapes of the 1970 Census by population of persons eighteen years and over)*. The variations in numbers of persons of voting age in legislative districts varies rather widely throughout the state even though the districts are of substantially equal overall population.

Appellants would argue that trivial variations 5 or 10 percent either way from the optimum, or even a little higher, should be set aside only when it can be shown

such variations result in meaningful effect on the processes of government. Such a rule would hurt no one and would enable the districting authorities to act with confidence and would be a long stride for the courts away from the "political thicket." Furthermore, such a rule on burden of proof would be consistent with that adopted in other areas of apportionment litigation. *See, Whitcomb* v. *Chavis,* 403 U.S. 124 (1971).

II

> Multi-member districting for Bexar County, Texas, does not dilute or cancel the votes of Mexican-American citizens where there are no findings of fact to support a contrary conclusion and where the Mexican-American citizens *are not a minority.*

The three members of the lower court could agree on no findings of fact concerning Bexar County. Judge Justice apparently wrote the pertinent part of the lower court opinion (42A-56A.) Circuit Judge Goldberg concurred in the result (109A.) Judge Wood concurred in the result and stated, speaking of the duty of federal courts to intrude into state affairs (107A-109A),

> *Whitcomb* v. *Chavis,* and its progeny, dictate that Federal Courts must do so where the preponderance of the evidence discloses that the State action "operates to dilute or cancel the voting strength of racial or political elements." In this connection, I personally feel that the evidence does in fact preponderate in this direction and that based on this test, I concur with my colleagues that the Board's Reapportionment Plans for multi-member districts in Bexar and Dallas Counties are unconstitutional for the various reasons stated in the majority opinion.

Nowhere are any facts found except that many Mexican-Americans suffer poverty, they constitute an indentifiable ethnic group, and they have not been as ac-

tive in political affairs as they could have been. There is no finding that they have in any way been denied participation in the democratic processes of Bexar County. Indeed, the record is strongly to the contrary. The lower court recognizes that Mexican-American citizens constitute about half the population of Bexar County (49A) and that they are a plurality in Bexar County (54A) but register and vote at very low rates, approximately 30% (54A.) The lower court states (55A),

> The fact that the State action at issue here, the apportionment of Bexar County, did not "cause" the lower voter participation is questionable argument and an irrelevant one.

It was stipulated that as recently as 1965 the then seven member multi-member district delegation from Bexar County to the Texas House of Representatives consisted of three Mexican-Americans, three Anglo-Americans and one Chinese-American. The present City Council of the City of San Antonio, elected at large, is shown by the record to be composed of nine members, three of whom are Mexican-Americans, one of whom is a Negro, and five of whom are Anglo-Americans (one of whom is a woman).

The federal courts should not embrace a rule that a disadvantaged group, regardless of numbers and access to the political processes, is entitled to favored treatment in legislative districting. Favored treatment is not "equal protection of the laws."

III

> No unconstitutional dilution or cancellation of the voting power of an ethnic group is shown to result from the use of multi-member districting where there is no evidence the group has been denied effective participation in the political processes and

the lower court finds no facts to support its conclusions and speculations that such dilution or cancellation has occurred.

It has been suggested that the Court is establishing different apportionment rules for the North and the South. *The Supreme Court, 1970 Term,* 85 HARV.L.REV. at 146 (1971.) This suggestion has been disavowed in the lower courts by a holding that the rule is the same unless racial motivation is shown by the evidence, *Twiggs* v. *West* (D. S.C., Civil Nos. 71-1106, April 7, 1972.) Nevertheless, the feeling voiced by the suggestion may explain the approach used by the lower court in the present case. That approach seems to be that because Texas has suffered racial segregation and discrimination in the past, "it is not unlikely that Texas' use of multi-member districts, taken in the entirety of Texas electoral laws and of Texas history, unconstitutionally infringes the voting rights of racial and political minorities in all Texas cities that are districted as multi-member" (39A). Not only has Texas' historical use of multi-member districts from at least as far back as 1848 been fully chronicled, *Kilgarlin* v. *Martin,* 252 F.Supp. 404, rev'd in part, *sub nom., Kilgarlin* v. *Hill,* 386 U.S. 120 (1967), the conclusions of the lower court are based on no facts and its conclusions of racial discrimination seem to stretch even the view of one whose business it is to know of such things.*

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*Testimony of Mr. Joseph Rauh, Legislative Counsel to the NAACP, urging unsuccessfully the broadening of the Voting Rights Act of 1965 to permit inclusion of certain counties in Texas. *Hearings on H.R. 6400 Before Subcommittee No. 5 of the House Comm. on the Judiciary,* 89th Cong. 1st Sess., at 694:

Mr. Rauh:

". . .

"But what we are saying is that there are four other States where there is pretty well-known discrimination

Appellants would argue that the record in this case is conclusively against the appellees, and against the holding of the lower court, on each of the objective standards for determining dilution or cancellation of voting power recognized in *Whitcomb* v. *Chavis,* 403 U.S. 124, 149-150 (1971) and also conclusive against any other possible objective finding that might tend to indicate dilution or cancellation of the ethnic vote. It was stipulated that the rights to register and vote have not been infringed. About all that can be said certainly about the record in this case is that it shows some people like multi-member districts and some do not. That this like or dislike tends to depend on whether or not a particular person is a member of a dominant political alignment is conceded. Negroes have not heretofore been elected from Dallas County in proportion to their numbers (two have been elected of four who have offered for office on the Democratic ticket, none have been elected as Republicans, though some have offered). Numbers alone would indicate that about 3 of the presently apportioned 18 representatives for the county should be Negroes. Nevertheless, the lack of Negro representatives has not been shown to be due to any dilution or cancellation of the vote or to any denial of access to the political process. In fact, the record establishes that Negroes in Dallas County, as elsewhere ir Texas, are politically active and politically effective.

The reasons for use of multi-member districts in Texas are as surely political as they are in most other

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against Negroes. It runs downhill from Florida and Arkansas to Tennessee and Texas.

". . .

"We are not claiming that those figures are adequate now to trigger action of this kind, but it will not cost $87 million to find out which counties in Tennessee, Texas, Virginia, and Arkansas are covered by the 25 percent figure . . ."

states. In an interesting but inconclusive study of the comparative effects on representation by multi and single member districts, JEWELL, METROPOLITAN REPRESENTATION: STATE LEGISLATIVE DISTRICTING IN URBAN COUNTIES: at 19 (1969), appears an analysis of why Harris County, Texas, was changed from a county wide multi-member district. The Democratic Party is split into two strong factions each of which was running slates of candidates. Neither faction wanted to gamble on a winner take all race for all the seats in the county. On the other hand, Dallas County, with a much stronger Republican minority than Harris County, has remained multi-member. In Dallas County the majority Democratic party has wanted to gamble on winner take all races. They lost in 1962 when the Republicans won every legislative seat for which they offered a candidate (6 out of 9 seats). The record in this case compels the conclusion that political and not racial motives have been responsible for use of multi-member districts in Dallas County.

SUMMARY

The lower court approach to the substantial and complex constitutional questions presented by this case seems best expressed by Judge Wood (99A),

> Under the present concept, the primary test of constitutionality in these cases is not the question of reasonableness, *vel non,* but rather turns on the question of whether the evidence merely preponderates against the fairness of the plan.

This approach necessarily makes the constitutionality of the challenged plan turn on the political philosophy of the court conducting the review. It does not meet the standards set by this Court, *e.g. Whitcomb* v. *Chavis, supra,* and it does not accord with keeping the judiciary confined to its proper scope of review.

Appellants contend that the plan for the legislative districting of the State of Texas falls within a permissible range of variation allowable in legislative districting, and contend further, that even should a test of mathematical precision be applicable, the state constitutional mandate to preserve county integrity is adequate justification for the small variations here presented.

CONCLUSION

For the foregoing reasons, it is requested that the Court note probable jurisdiction of this case and set it for argument and plenary consideration.

Respectfully submitted,

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